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No. 89-600

In the
Supreme Court of the United States
October Term, 1989

WILLIAM ST. CLAIR and JOHN SHELTON,
Petitioners,
v.
CITY OF CHICO and COUNTY OF BUTTE,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Where the complaint in an action under 42 U.S.C. § 1983 adequately alleges that defendants have reached a final decision on plaintiffs' land use applications, may the court dismiss the action as unripe, on a motion under Fed. R. Civ. Proc. 12(b)(1) claiming lack of subject matter jurisdiction, without permitting plaintiffs a full and fair opportunity to discover and present evidence supporting jurisdiction?

2. What procedural safeguards are afforded plaintiffs in 42 U.S.C. § 1983 actions in resisting motions to dismiss for lack of subject matter jurisdiction on the ground of unripeness, where the complaint on its face adequately alleges a final decision on plaintiffs' land use applications?

3. Are the standards and procedural safeguards for determining ripeness in land use cases under 42 U.S.C. § 1983 materially different from those generally applicable in deciding subject matter jurisdiction in other types of cases?

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Petitioners William St. Clair and John Shelton respectfully pray this Court to issue a Writ of Certiorari to review the opinion and order of the United States Court of Appeals for the Ninth Circuit dated July 13, 1989.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit was rendered on July 13, 1989, and is reported at 880 F.2d 199 (9th Cir. 1989). It is attached hereto as Appendix

(App.) A. The opinion of the United States District Court for the Eastern District of California, granting respondents' motions for dismissal of petitioners' action, was rendered on February 12, 1988 in open court, and is unreported. It is attached hereto as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit, affirming the district court's dismissal of petitioners' action, was entered on July 13, 1989. Petitioners have timely filed this Petition for a Writ of Certiorari, and the jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the person injured in an action at law, suit in equity, or other proper proceeding for redress. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Petitioners are and at all times material herein were engaged in the business of real estate development. Petitioners brought this action in the United States District Court for the Eastern District

of California, alleging that respondents City of Chico and County of Butte had taken their property without just compensation and had denied them equal protection of the laws in connection with a real estate development project known as Ravenwood, in violation of 42 U.S.C. § 1983. The jurisdiction of the district court was based on 28 U.S.C. § 1331. Respondents moved to dismiss petitioners' action under Fed. R. Civ. Proc. 12(b)(1) and 12(b)(6), alleging, among other things, that the action was not ripe for adjudication. Taking respondents' assertions of fact to be true and brushing aside petitioners' requests for discovery, the district court granted respondents' motions, holding that this action was not ripe. On appeal, the United States Court of Appeals for the Ninth Circuit affirmed.

In 1980, petitioners were the owners of a tract of land located on the northern border of the City of Chico, California, in the County of Butte. Petitioners planned to build a residential real estate development on the land, to be known as Ravenwood. The project was to include more than 300 moderately-priced homes, selling for an average price of $60,000 to $70,000.

In order to construct the Ravenwood project, petitioners had to obtain a number of government approvals and permits. Included among the aspects of the project for which petitioners had to obtain government approval was a means of sewage disposal and/or treatment. In this regard, petitioners had two available options. First, they could develop the project under the authority and jurisdiction of the County of Butte, by developing and submitting plans for an independent sewage treatment facility that would meet the applicable water quality standards. Second, they could develop the Ravenwood project under the authority and jurisdiction of the City of Chico, by annexing the property to the City and connecting it to the City sewer system. Petitioners pursued both courses of action, but their efforts were thwarted by respondents' illegal actions.

Petitioners first sought and received a zoning change necessary for development of the project. In making that application, petitioners made a detailed presentation of the Ravenwood project, permitting every affected government and agency to comment on or object to any aspect of the project. By doing so, petitioners were able to address any concerns or objections raised at an early

stage, and to obtain the approval of the affected governments and agencies. Upon the completion of that process, the County granted the zoning change, subject to certain specified conditions incorporating the governments' and agencies' concerns. Petitioners were, at all times material herein, ready and able to meet those conditions, with the exception of one condition, which gave rise to this action.

One of the conditions imposed by the County was that petitioners connect the Ravenwood project to the City of Chico sewer system. Petitioners applied for such a connection. In response, the City notified petitioners that it had approved their application, and that it would connect Ravenwood to the City sewer system upon the payment of a connection fee and the meeting of certain conditions, including the execution of an annexation petition or agreement. Petitioners agreed to pay the connection fee and to meet the specified conditions.

Before they were able to do so, however, respondent City of Chico, without even informing petitioners of its actions, imposed additional requirements for connection of the Ravenwood project to the City sewer system. Even though it had already approved the connection, the City informed the County of Butte that it would honor its commitment only if the County acceded to a series of political concessions having no relation to the Ravenwood project. Specifically, the City demanded that the County agree to seek no changes in the "green line," a line of demarcation limiting urban expansion in the Chico area; that the County zone certain parcels of land (not including the Ravenwood property) outside the City but within the County in a certain manner; and that the County agree to the establishment of an urban plan committee, for consideration of general matters regarding urban planning in the area. None of these concessions were necessary for the Ravenwood project to go forward, none of them furthered any legitimate State interest with relation to the project, and none of them bore any legitimate relation to the project. Instead, the conditions were arbitrary and capricious, and constituted unconstitutional conditions placed by respondent City of Chico on petitioners' ability to develop the property in any substantial manner. They were also discriminatory, as the City singled out petitioners for such treatment, while permitting other, politically-favored developers to con-

struct similar projects without any such conditions.

Respondent County of Butte refused to accede to those conditions. The City, however, knowing that its position would make a sewer connection impossible, refused to relent, and continued to make a sewer connection contingent on County agreement to its demands. Because the conditions were not within petitioners' control or influence, petitioners were unable to meet the conditions by their own actions. They endeavored to convince the City to drop its conditions, but the City refused to do so. After several months, petitioners realized that the City and the County had reached an impasse, and that a sewer connection would not be possible.

Petitioners therefore applied to the County of Butte for approval of a sewage treatment facility for the project. That facility met all applicable standards and requirements with regard to water quality, sewage capacity, and the public health, safety, and general welfare, and had been approved by the California Regional Water Quality Control Board and the County of Butte Planning Commission. The County Board of Commissioners, however, rejected petitioners' application, and continued to require connection of the Ravenwood project to the City sewer system. No appeal was available from the County's decision. Because the County's objection was to the construction of a sewage treatment facility as opposed to connection to the City sewer system, and was not tied to any deficiencies in the design of the system proposed by petitioners (the County cited no such deficiencies to petitioners), petitioners were unable to win approval by submission of an amended application.

The County's decision, like the City's before it, was arbitrary and capricious, and did not further any legitimate State interest with regard to the project. It was also discriminatory, as the County had approved similar sewage treatment facilities for similar projects.

Both the City's and the County's decisions were final in all respects. In both instances, the decisions were made at the highest levels of the respective governments, from which no appeal was possible. They were not rules of general applicability, but instead were decisions made with specific reference to the Ravenwood project. They were not based on specific aspects of the applications, such as size, location, design, or engineering, which were within the power of petitioners to change. The City's decision was

based on its desire to extract political concessions from the County, having nothing to do with the Ravenwood project at all. Petitioners had no power to affect that decision in any way. The County's decision, apparently, was based on its resolve to withstand the City's pressure. Again, petitioners could not, by further applications, change that decision. Neither respondent informed petitioners that its decision was subject to further review. Instead, despite several efforts by petitioners to break respondents' deadlock, petitioners were unable to do so, and respondents indicated that their decisions were final.

As a result of respondents' actions, the Ravenwood project was entirely destroyed. In fact, all substantial use of the property was precluded, as no such development could occur without sewage treatment or disposal. As a result thereof, petitioners eventually entered into bankruptcy, as a part of which they lost the subject property.

Petitioners brought this action, alleging that respondents' actions were arbitrary and capricious, and that respondents had denied them the equal protection of the laws and had taken their property without just compensation. Almost immediately, respondents moved to dismiss petitioners' action, a course of conduct that continued until entry of the district court's judgment. Petitioners attempted to conduct discovery, but with the exception of some initial written discovery, were thwarted in their efforts by respondents. On one occasion, respondents moved for a protective order blocking the taking of scheduled depositions, on the ground that no discovery should be permitted before resolution of respondents' motions for dismissal.

The district court granted respondents' motions, holding that petitioners' action was not ripe for adjudication, on the ground that respondents had not made a final decision on petitioners' applications. On appeal, the court of appeals affirmed for essentially the same reason, holding that respondents had not reached an impasse. Because these holdings constitute resolutions of fact made by the lower courts without affording petitioners an adequate opportunity to obtain discovery of the relevant facts, which are in the possession of respondents, and because the lower courts appear to be using the principle of ripeness as a means of

early and unwarranted dismissal of land use cases in order to prevent the bringing of such cases in the federal courts, petitioners seek a Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

I

Certiorari is Necessary to Clarify and Preserve the Jurisdiction of the Federal Courts

In their third amended complaint, petitioners alleged that respondents had taken their property without just compensation and had denied them the equal protection of the laws, in violation of the Fifth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. The City of Chico, for its part, had decided that it would permit petitioners to connect the Ravenwood project to the City sewer system only if the County of Butte agreed to three political concessions: (1) agreement to new urban boundaries, to remain in place for ten years or until the urban population reached 100,000; (2) agreement to an urban plan committee, which would adopt a comprehensive general plan for the area; and (3) agreement to specified zoning for property outside the new urban boundaries. None of these conditions had any relation to the Ravenwood project or to petitioners' application for a sewer connection, and none of them were within petitioners' ability to perform. Thus, there was no nexus between the conditions imposed and any legitimate state interest with regard to petitioners' application, and the City's actions constituted unconstitutional conditions, made actionable by this Court in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987).

The County of Butte, for its part, then rejected petitioners' application for an amendment of the development plan to permit construction of a sewage treatment facility, and continued to condition approval of the Ravenwood project on connection to the City sewer system. That condition also had no nexus to any legitimate

state interest with regard to petitioners' application, since a sewer connection had already been made impossible by the City's conditions and the County's refusal to agree to them, and since the proposed sewage treatment facility met all requirements for protection of the public health, safety, and general welfare. Thus, the County's actions were likewise unlawful.

Respondents' determinations were not applications of general zoning regulations, from which petitioners could appeal or seek variances. Instead, they were final decisions made at the highest levels of the respective governments, with specific application to the Ravenwood project, from which no appeal was possible and no variance could be obtained. The City and the County did not set general policies, which might be relaxed to accommodate individual circumstances. Indeed, the Ravenwood project met the applicable zoning requirements. The City and County made specific decisions applicable to Ravenwood alone. The City's conditions, while attached to Ravenwood, were not related to that project at all, and were directed to the County rather than to petitioners. Thus, petitioners were unable to meet those conditions by any actions of their own, no matter how willing they were to satisfy them. The County's decision was similarly final: the County denied petitioners' application for approval of a sewage treatment facility not because of any deficiencies in petitioners' application or the facility's design, but because it was something other than connection to the City sewer system. With that connection foreclosed, petitioners could do nothing to satisfy the County's demands.

Like the characters in *Catch-22*, petitioners were caught in an absurd and impossible position. The County required connection to the City sewer system. The City refused to permit that connection unless the County agreed to certain unrelated political concessions. The County refused to agree to those concessions. But the County also refused to permit a reasonable amendment of the development plan (the construction of a sewage treatment facility) that would permit the already-approved project to go forward without the concessions, insisting on a connection to the City sewer system.

Petitioners made numerous attempts to break respondents' impasse, but were unable to do so. Both respondents had made their final decisions, at the highest levels of their respective governments. Thus, petitioners were left with two options: they could

abandon the project, or they could wait, in the hope that one respondent or the other would eventually change its mind. The first option, which petitioners were forced into by bankruptcy, proved the finality of respondents' decisions. The second option, which petitioners attempted as long as they were able, did not take away from that finality, as a landowner should not be required to pile one rejection on top of another, on the slight chance that a government, having made the same decision on one, five, or ten occasions, might make a different decision on the eleventh. Petitioners' efforts were sufficient, and any further applications would have been futile.

These allegations, if true, lead inescapably to the conclusion that petitioners' action was ripe for adjudication. *Compare, e.g., Orion Corp. v. State of Washington,* 103 Wash. 2d 441, 693 P.2d 1369, 1377-80 (1985), *on appeal after remand,* 109 Wash. 2d 621, 747 P.2d 1062, 1068-69 (1987) (holding that action was ripe for adjudication even though landowner had made no application for development, since the very purpose of the government regulations was to preclude such development). The district court, however, dismissed petitioners' complaint, holding that "there has been no final determination on [petitioners'] sewer permit application." [App. B, at 3] The court rejected petitioners' arguments to the contrary, characterizing those arguments as "a futility defense" and stating, without elaboration, that petitioners "have not demonstrated futility." [*Id.*] The court of appeals affirmed, not even reaching the question of futility "because we believe the City and the County had not reached an impasse regarding the negotiations on the political concessions." 880 F.2d at 203. [App. A at 8]

By those decisions, the lower courts abdicated their proper jurisdiction, using the principle of ripeness as a means of disposing of this action without the procedural safeguards imposed on a determination on the merits. In *MacDonald, Sommer & Frates v. County of Yolo,* 477 U.S. 340 (1986), and *Williamson County Regional Planning Comm'n v. Hamilton Bank,* 473 U.S. 172 (1985), this Court clearly indicated that where a government has reached a final decision on a landowner's land use application, the landowner's section 1983 claim is ripe for adjudication, and must be decided on its merits. In this case, the lower courts have circumvented that requirement through a misuse of the ripeness doc-

trine. By calling their determinations jurisdictional, they have made determinations of fact that, if made on the merits, would have been manifestly improper. Such a shortcutting of the litigation process should be halted immediately, through the establishment of regular procedures for the determination of ripeness, and an application of those procedures in this case.

In several cases, this Court has set forth criteria for the determination of jurisdiction in general. Where the jurisdiction of the district court has been challenged on a motion for dismissal on the pleadings, for example, jurisdiction "is to be determined by the allegations of the complaint." *Moore v. Chesapeake & O. Ry.*, 291 U.S. 205, 210 (1934). On such a challenge, "the allegations of the complaint should be construed favorably to the pleader." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). The action should be dismissed only if "plainly insubstantial." *Hurn v. Oursler*, 289 U.S. 238, 240 (1933).

Where the parties have gone beyond the bare pleadings, the standards and requirements are similar. The district court may not dismiss an action simply because it does not feel that the plaintiff will ultimately prevail on its claim. As stated by this Court in *Barry v. Edmunds*, 116 U.S. 550, 559 (1886):

> It might happen that the judge, on the trial or hearing of a cause, would receive impressions amounting to a moral certainty that it does not really and substantially involve a dispute or controversy within the jurisdiction of the court. But upon such a personal conviction, however strong, he would not be at liberty to act, unless the facts on which the persuasion is based, when made distinctly to appear on the record, create a legal certainty of the conclusion based on them.

In determining those facts, the court has inherent authority to issue orders, including orders of discovery, "as necessary for the court to determine and rule upon its own jurisdiction." *United States Catholic Conf. v. Abortion Rights Mobilization, Inc.*, 487 U.S. ____, 108 S. Ct. 2268, 2272, 101 L. Ed. 2d 69, 79 (1988). Included in that authority is the court's ability to limit initial discovery to the question of jurisdiction. *Id.*

Thus, in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), the district court had dismissed the plaintiff's action for lack of standing, based on its conclusion that the plaintiff had suffered no injury in fact. The court of appeals reversed that judgment, and this Court affirmed in relevant part, holding that additional development of the facts was necessary, and thus that dismissal on the pleadings was inappropriate at that stage of the proceedings. *Id.* at 377-78.

Similarly, in *Bell v. Hood*, 327 U.S. 678 (1946), the district court had dismissed the plaintiffs' action on the ground that it did not arise under the Constitution or laws of the United States. The court of appeals affirmed that judgment, but this Court reversed. As stated by the Court:

> Jurisdiction . . . is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction.

Id. at 682.

In *Barry v. Edmunds*, 116 U.S. 550 (1886), the lower court had dismissed the plaintiff's action, based on its conclusion that the matter in controversy did not meet the jurisdictional amount (then $500), despite the plaintiff's pleading, which had demanded damages in excess of $6,000. This Court reversed that judgment, holding that the plaintiff's claim was colorable, and therefore must control, absent evidence establishing the contrary. *Id.* at 559-65.

And in *Buck v. Gallagher*, 307 U.S. 95 (1939), the district court dismissed the plaintiff's action, for the same reason. In that case, involving the application of a state statute, the plaintiff had offered

to present testimony on the cost of compliance, but the court had rejected that offer on the ground that the cost of compliance was not the proper measure for determining the amount at issue. The plaintiff requested the opportunity to present further evidence, which the trial court denied. This Court reversed the lower court's dismissal, holding that "the refusal to permit additional evidence was error." *Id.* at 103.

These standards should be equally applicable to the question of ripeness, and should be made explicitly so by this Court. Ripeness, like standing and jurisdictional amount, is an element of jurisdiction that is based on, and is therefore dependent on findings of, particular facts. Where jurisdiction is challenged on the basis of the pleadings, the trial court should base its determination on the allegations of the complaint, construing those allegations in favor of the plaintiff. Where the challenge is based on evidence concerning ripeness, the trial court should allow the parties the opportunity to develop the facts to the full extent necessary for the determination, and should permit them to conduct appropriate discovery to establish the relevant facts. Upon presentation of those facts, the court should find jurisdiction unless the facts create "a legal certainty" that the case is not ripe.

Application of those standards here would lead to a reversal of the lower courts' decisions. Petitioners have alleged that respondents made final decisions at the highest levels of their respective governments. The lower courts, however, did consider some evidence purportedly supporting their decisions, basing their factual determinations on a single sentence in one of the documents: the Deputy City Manager's statement that because the City's conditions would require considerable study and discussion, "it does not appear appropriate, at this time, for the City to consider further the connection of the Ravenwood Project to the City's sewer system." Apparently on the basis of that statement, the district court concluded that further applications would not have been futile, and the court of appeals concluded that the City and the County had not reached an impasse.

Those conclusions, however, are erroneous for several reasons. First, the document itself is not so clear that it satisfied the standard, quoted above, set forth in *Barry v. Edmunds*, 116 U.S. at 559. While the Deputy City Manager, as a member of the govern-

ment body that had imposed the conditions and obviously wished to have the County agree to them, may have publicly assumed that the County would agree to them, and thus enter into the "study and discussions" referred to in the document, there is no indication, in the document or elsewhere, that the County had ever agreed to the conditions, or even to a further consideration of them. Moreover, the document hardly expresses a conviction that further applications would have any more success than the prior applications. Its tenor is closer to "don't call us, we'll call you" than to an invitation. In any event, a landowner, having already had its application de facto rejected, should not be required to remake the same application again and again, on a faint hope that, on some occasion, the City or County will change its mind.

Second, petitioners argued to the lower courts that determination of this issue would be premature, and that the district court should permit discovery on the issue. Both courts rejected that argument. Under *Havens Realty Corp. v. Coleman*, 455 U.S. at 377-78, *Bell v. Hood*, 327 U.S. at 682, *Barry v. Edmunds*, 116 U.S. at 559-65, and *Buck v. Gallagher*, 307 U.S. at 103, those decisions were erroneous.

The lower courts, failing even to make specific findings of fact, made factual determinations on the basis of an inadequate record, rejected petitioners' requests for discovery directed to the question of ripeness, and failed to apply procedural safeguards necessary and appropriate to the protection of the parties' rights. In order to establish and clarify the procedural standards applicable to the ripeness issue, and to enforce those standards, this Court should grant certiorari to review the court of appeals' decision.

II

Certiorari is Necessary to Establish Important Procedures for the Administration of Justice

In *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986), and *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), this Court established and defined the principle of ripeness as applied to regulatory taking

claims. Specifically, this Court held that "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. at 186.

This Court, however, has not yet defined the appropriate procedures for the determination of ripeness. In *MacDonald*, the plaintiff's jurisdictional failure was evident on the face of the complaint. *See* 477 U.S. at 342–44. In *Williamson*, on the other hand, the trial court had conducted a full trial on the merits. *See* 473 U.S. at 182–83. Those cases, then, represent the extremes in terms of evidentiary support for a finding on ripeness. Between those two extremes lie the vast majority of regulatory taking cases. In those cases, Supreme Court guidance as to the necessary procedures is warranted.

The district courts and circuit courts have not filled that gap. In the Ninth Circuit, the court of appeals has established substantive standards governing the application of the ripeness doctrine in most circumstances. *See Kinzli v. City of Santa Cruz*, 818 F.2d 1449 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 775, 98 L. Ed. 2d 861 (1988). In that case, the court held that a finding of ripeness requires both rejection of a development plan and denial of a variance. 818 F.2d at 1454. A landowner may avoid that requirement, the court held, if attempts to comply would be futile, as long as the landowner has made at least one meaningful application. *Id.* at 1454–55. It has not, however, established procedural standards for those determinations. As a result, the procedures actually used by the courts have varied widely, raising substantial questions of procedural due process. *See, e.g., Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428–32 (1982) (describing the procedural requirements imposed by the due process clause).

In *Herrington v. County of Sonoma*, 834 F.2d 1488 (9th Cir. 1987), *amended on rehearing*, 857 F.2d 567 (9th Cir. 1988), for example, the district court faced questions of compliance with the *Kinzli* requirements and futility. The court made its ripeness determinations after trial, when it had testimony from the pertinent witnesses, tested by cross-examination, on which to base its deci-

sions. In this case, by contrast, the district court, faced with the same issues, failed to make such a careful examination of the underlying facts. In this case, the court made its determinations on the basis of respondents' assertions of fact and one item of evidence, while brushing aside petitioners' allegations and request for discovery on the questions presented.

This disparity in procedure demonstrates the need for procedural guidelines, to ensure that this important and potentially dispositive determination is made with appropriate safeguards. The Supreme Court's "supervision of the administration of [civil] justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence." *McNabb v. United States*, 318 U.S. 332, 340 (1943) (criminal case). On several occasions, this Court has granted certiorari to resolve important procedural issues. *See, e.g., United States v. Hale*, 422 U.S. 171, 173 (1975); *Elkins v. United States*, 364 U.S. 206, 208 (1960); *Mallory v. United States*, 354 U.S. 449, 450 (1957).

In this case, certiorari is particularly warranted, since the procedure used by the district court, and affirmed by the court of appeals, was insufficient to protect petitioners' rights. In this case, the courts took respondents' allegations of fact as true, while disbelieving petitioners' allegations; accepted and relied on a single, ambiguous document as proving an issue of intent, while dismissing petitioners' calls for additional discovery on that question; and denied petitioners an adequate opportunity to present evidence on the issues presented. "As the Court of last resort in the federal system, [the Supreme Court has] supervisory authority and therefore must occasionally perform a pure error-correcting function in federal litigation." *Florida v. Rodriguez*, 469 U.S. 1, 7 (1984) (Stevens, J., dissenting). In addition to presenting an opportunity to establish and define the appropriate procedures in resolving questions of ripeness, this case presents such an occasion.

In dealing with related issues, this Court has not hesitated to correct procedural inadequacies and to impose necessary safeguards. In *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), for example, the Court was faced with questions of standing and injury in fact. Finding that additional development of the facts was necessary, the Court held that the district court's dismissal of the action on the pleadings was inappropriate. *Id.* at 377-78. Similarly,

in *Bell v. Hood*, 327 U.S. 678 (1946), the trial court had dismissed the petitioners' complaint for lack of jurisdiction, on the ground that the controversy alleged did not arise under the Constitution of the United States. *See id.* at 680. This Court reversed, correcting the lower courts' procedural errors and setting forth the proper standards to govern such a challenge. *Id.* at 682–83.

This case is similar. In *MacDonald* and *Williamson*, this Court established a set of substantive standards on the question of ripeness in regulatory taking claims. In attempting to apply those standards, the lower courts have used a variety of procedures, some of which have been inadequate to protect the rights of the parties. At this time, neither the Federal Rules of Civil Procedure nor the decisions of the federal courts have defined the procedures necessary to ensure a fair determination of the ripeness issue. In this case, the procedure used was inadequate, with the lower courts making factual determinations without affording petitioners an opportunity to develop and present the pertinent facts to the court. Because of that failure, and the failure of the lower courts to establish and apply necessary procedural safeguards, this Court should grant certiorari for the purpose of defining those standards.

CONCLUSION

For the reasons stated above, petitioners respectfully request that this Court grant their petition for a writ of certiorari.

Respectfully submitted this 11th day of October, 1989.

GRAY, PLANT, MOOTY,
MOOTY & BENNETT, P.A.
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United States Court of Appeals for the Ninth Circuit

No. 88-2504

D.C. No. CV-S-85-534-EJG

OPINION

WILLIAM ST. CLAIR; JOHN SHELTON,
Plaintiffs-Appellants,

v.

CITY OF CHICO; COUNTY OF BUTTE,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of California
Edward J. Garcia, District Judge, Presiding

Argued and Submitted
March 17, 1989—San Francisco, California

Filed July 13, 1989

Before: Cecil F. Poole, Robert Boochever and Charles Wiggins, Circuit Judges.

Opinion by Judge Wiggins

SUMMARY

Courts and Procedure

Affirming the district court's dismissal of complaint, the court held that dismissal of complaint for unjust taking was proper because the claims were not ripe for adjudication.

William St. Clair and John Shelton filed suits against the City of Chico and the County of Butte for allegedly denying their rights to equal protection by refusing to permit the construction of an independent sewage treatment facility even though similar projects received such approval, that the City allegedly denied St. Clair's and Shelton's rights to substantive due process and equal protection by imposing conditions on the approval of their application that were unrelated to the project's merits, and that County's and City's actions, taken together, allegedly effected an unconstitutional taking of property without just compensation. The district court granted the County's and City's motions for dismissal, finding the issues were not ripe for adjudication.

[1] The finality requirement under the two-step test (first rejecting a development plan, and then, denying a variance from its regulations) was not satisfied by a rejected proposal for the construction of an independent sewage treatment facility. **[2]** Instead, evidence suggested the County merely postponed serious consideration of the application until St. Clair and Shelton exhausted all opportunity of succeeding on their alternative proposal before the City. **[3]** The County and City were apparently still negotiating with the strong likelihood of agreement when St. Clair and Shelton filed their suit. **[4]** Until the City or County reached a final, definitive position rejecting St. Clair's and Shelton's two alternative proposals for obtaining sewer service to their property, St. Clair and Shelton could not have been deprived of all use of their property.

COUNSEL

Daniel R. Shulman, Minneapolis, Minnesota, for the plaintiffs-appellants.

Fran Layton, San Francisco, California, and Carolee Kildruff, Sacramento, California, for the defendants-appellees.

OPINION

WIGGINS, Circuit Judge:

Appellants William St. Clair and John Shelton timely appeal an order of the district court dismissing their complaint because it considered their claims not ripe for adjudication. Appellants assert that the district court erred both in its legal conclusion and in basing its decision on facts not alleged in the complaint, at least without first permitting discovery. The district court had jurisdiction of this case pursuant to 28 U.S.C. § 1331 (1982) and our jurisdiction rests on 28 U.S.C. § 1291 (1982). We affirm.

I

Appellants brought this action under 42 U.S.C. § 1983 (1982) alleging that the City of Chico's ("City") and the County of Butte's ("County") refusals either to connect Appellants' proposed real estate project to an existing sewer system or allow them to construct their own treatment facility effected an unconstitutional taking of their property and also deprived them of their constitutional rights to due process and equal protection of the laws. Appellants alleged in their complaint that they began the permitting process for approval of their proposed "Ravenwood" development by first receiving a required zoning change from the the County. As a condition to that zoning change, however, the County required Appellants to connect their project to the City's sewer system. According to the allegations of the complaint, the City initially approved Appellants' application for a sewer connection, but subsequently conditioned its approval on the County's political concessions to matters that allegedly were unrelated to the merits of the Ravenwood development. Appellants further alleged in their complaint that the County would not accede to these conditions, nor would the City permit the sewer connection without them. Fearing an impasse, Appellants sought the County's approval for the construction of an independent sewage treatment facility. But the County, allegedly in a final decision from which no appeal or variance was possible, refused the application and continued to condition approval of the project on its connection to the City's

sewer system. According to the complaint, similar projects received the County's approval for the construction of independent treatment facilities. The complaint concludes that the impasse reached between the City and the County ultimately caused Ravenwood to enter bankruptcy.

Both the City and County filed motions of dismissal contending either that, under Fed. R. Civ. P. 12(b)(6) Appellants were not entitled to relief, or that under Fed. R. Civ. P. 12(b)(1) the district court was without federal jurisdiction. The City contested the complaint's factual allegations that approval of the sewer connection was all but complete before the dispute between the City and the County arose. Rather, the City referred to evidence in the record that approval of the connection depended, at least in part, on the annexation of the Ravenwood project to the City. In addition, both the City and the County contested the complaint's factual allegations that an impasse had been reached on the alleged political concessions. Both parties contended that discussions were continuing and that Appellants were never led to believe by either party that their project would not ultimately receive the necessary approval. The district court concluded that Appellants' claims were not ripe for adjudication both because there was never a "final decision" rejecting the proposed sewer connection and because Appellants' failure even to attempt annexation belied their argument that annexation would have been futile. Accordingly, the district court dismissed Appellants' complaint for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1).

II

The main issue in this case is accompanied by a procedural problem that we consider first. Appellants note that the district court's decision dismissing their complaint expressly rested on exhibits outside the complaint. Appellants argue that the decision is in error because the district court failed to assume the truth of the facts alleged in the complaint and that those facts do not support its conclusion. The district court did not err.

Whether a claim is ripe for adjudication goes to a court's subject matter jurisdiction under the case or controversy clause of arti-

cle III of the federal Constitution. *Unity Ventures v. County of Lake*, 841 F.2d 770, 774 (7th Cir.), *cert. denied*, 109 S. Ct. 226 (1988). Like other challenges to a court's subject matter jurisdiction, motions raising the ripeness issue are treated as brought under Rule 12(b)(1) even if improperly identified by the moving party as brought under Rule 12(b)(6). *See Biotics Research Corp. v. Heckler*, 710 F.2d 1375, 1379 (9th Cir. 1983). *See generally* 5 C. Wright & A. Miller, *Federal Practice & Procedure* § 1350 (1969). Unlike a Rule 12(b)(6) motion, a Rule 12(b)(1) motion can attack the substance of a complaint's jurisdictional allegations despite their formal sufficiency, and in so doing rely on affidavits or any other evidence properly before the court. *See Thornhill Publishing Co. v. General Tel. & Elec. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979); *see also* C. Wright & A. Miller, *supra*, § 1350, at 550–51. It then becomes necessary for the party opposing the motion to present affidavits or any other evidence necessary to satisfy its burden of establishing that the court, in fact, possesses subject matter jurisdiction. The district court obviously does not abuse its discretion by looking to this extra-pleading material in deciding the issue, even if it becomes necessary to resolve factual disputes. *See Thornhill Publishing*, 594 F.2d at 733.

There are only a few procedural limitations placed on a district court when it faces a factual challenge to a complaint's jurisdictional allegations. *See* C. Wright & A. Miller, *supra*, § 1350, at 558–59; *see also Crawford v. United States*, 796 F.2d 924, 929 (7th Cir. 1986) ("No format is specified by statute or rule for evidentiary hearings on jurisdiction; any rational mode of inquiry will do."). Appellants argue that two such limitations apply here, but we find them both inapposite. Appellants assert first that the district court erred in denying them the opportunity of conducting additional discovery before making its decision. Discovery is necessary, however, only if it is possible that the plaintiff can demonstrate the requisite jurisdictional facts if afforded that opportunity. *See Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 430 n.24 (9th Cir. 1977). Where, as here, the extra-pleading material demonstrates that the controlling questions of fact are undisputed, additional discovery would be useless. *Cf. Williamson v. Tucker*, 645 F.2d 404, 414 (5th Cir.) ("Insofar as the defendant's

motion to dismiss raises factual issues, the plaintiff should have an opportunity to develop and argue the facts in a manner that is adequate in the context of the disputed issues and evidence."), *cert. denied*, 454 U.S. 897 (1981). Also, Appellants have not explained why they failed to conduct adequate discovery on the jurisdictional issue even though they conducted substantial discovery on the merits of their claims during the period preceding the filing of the City's and the County's motions for dismissal. *Cf. Berardinelli v. Castle & Cooke Inc.*, 587 F.2d 37, 39 (9th Cir. 1978) (per curiam) (rejecting similar argument in part because plaintiff made no effort to undertake any discovery during period between filing of complaint and filing of motion to dismiss). The district court did not err in denying Appellants the opportunity to conduct additional discovery under these circumstances.

Appellants argue next that the district court should have reserved decision on the jurisdictional issue until after a completed trial on the merits. They concede that ordinarily the issue of jurisdiction is for the district judge to decide, but they contend that a jurisdictional issue that is "intertwined" with the merits must be decided by a jury and, as a result, must await trial on the merits. The problem with Appellants' argument is that "the jurisdictional issue and the issue on the merits are [not] factually so 'completely intermeshed,' *McBeath v. Inter-American Citizens for Decency Committee*, 374 F.2d 359, 362-63 (5th Cir. 1967), that 'the question of jurisdiction is dependent on decision of the merits,' *Land v. Dollar*, 330 U.S. 731, 735 (1947)." *Berardinelli*, 587 F.2d at 39. As we made clear in *Herrington v. County of Sonoma*, 857 F.2d 567 (9th Cir. 1988), *modifying* 834 F.2d 1488 (9th Cir. 1987), *cert. denied*, 109 S. Ct. 1557 (1989), the issue of ripeness has nothing to do with the merits of claims challenging land use regulations and, indeed, a district court errs if it submits the issue to the jury. *See id.* at 568. In short, the district court did not err in deciding the ripeness issue under the terms of Fed. R. Civ. P. 12(b)(1).

III

The focus of this appeal is on the district court's legal conclusion that Appellants' claims against the City and the County were

not ripe for adjudication. We review this decision de novo. *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1453 n.4 (9th Cir. 1987), *modified*, 830 F.2d 968 (9th Cir.), *cert. denied*, 108 S. Ct. 775 (1988). There are essentially three claims underlying Appellants' complaint. First, the County allegedly denied Appellants' rights to the equal protection of the laws by refusing to permit the construction of an independent sewage treatment facility even though similar projects received such approval. Second, the City allegedly denied Appellants' rights to substantive due process and equal protection of the laws by imposing conditions on the approval of their application that were unrelated to the merits of the project. And third, the County's and the City's actions, taken together, allegedly effected an unconstitutional taking of Appellants' property without just compensation. Each of these claims is subject to the same ripeness standards that are applied generally to constitutional challenges of land use regulations. *Herrington*, 857 F.2d at 569 & n.1.

The purpose of the ripeness doctrine is to avoid premature judicial review of administration action. This goal is accomplished by deferring review of a planning commission's land use decisions until they represent a "'final, definitive position regarding how it will apply the regulations at issue to the particular land in question.'" *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 351 (1986) (quoting *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 191 (1985)). The finality requirement is satisfied only if the planning commission first rejects a "development plan" and then denies a variance from its regulations. *E.g., Herrington*, 857 F.2d at 569; *Kinzli*, 818 F.2d at 1454. This two-step test can be avoided only if compliance would be futile, and even then only if the property owner first makes at least one "meaningful application." *Herrington*, 857 F.2d at 569; *Kinzli*, 818 F.2d at 1454-55.

[1] Appellants argue here that the district court erred in concluding that each of its claims failed to satisfy these requirements. There is no question that this case does not concern the submission, consideration, and rejection of a "development plan," as in *Herrington* and *Kinzli*. Appellants contend nonetheless that the finality requirement can be met "by a rejected application or proposal for [a sewer] connection." *Unity Ventures v. County of*

Lake, 841 F.2d 770, 775 (7th Cir.), *cert. denied*, 109 S. Ct. 226 (1988), and, analogously, by a rejected proposal for the construction of an independent sewage treatment facility. Although we recognize this to be a correct statement of the law, we reject the corollary to Appellants' argument that both the City and the County reached final decisions rejecting their alternative proposals for obtaining sewer service to their property.

[2] Regarding the claim against the County, Appellants assert that they sought approval for the construction of an independent treatment facility but were turned away in a final decision from which no variance was possible. The district court concluded otherwise, apparently believing that the County rejected Appellants' claim only because it believed they had not yet received a rejection from the City on their application for a connection to the City's sewer system. Presumably, then, if the City had ultimately rejected that proposal the County would have reconsidered its position regarding Appellants' application for the construction of an independent treatment facility. Undisputed material in the record supports such a determination. Exhibit E, attached to the Declaration of David M. Coyne, Appellants' own attorney, indicates that the Planning Commission recommended approval of the proposed treatment facility, but only on condition that, among other things, "all efforts" must first "have been exhausted with the City of Chico to get approval of the hookup to the sewer system." This evidence suggests that the County merely postponed serious consideration of Appellants' application until they exhausted all opportunity of succeeding on their alternative proposal.

[3] Regarding their claim against the City, Appellants argue essentially that the City placed two conditions on the acceptance of their application for a sewer connection: first, the County's concessions to political demands, and second, Appellants' annexation of their property to the City. Appellants argued below, and reassert here, that because the first condition could never be satisfied their compliance with the second condition would have been futile. We need not address Appellants' futility argument, however, because we believe the City and the County had not reached an impasse regarding the negotiations on the political concessions. Therefore, they could have ultimately reached an agreement that would have satisfied the first condition to Appellants' application.

Undisputed material in the record supports this conclusion, too. Responding to Appellants' inquiry into the progress of their application, the City wrote that it was inappropriate "at [that] time" to consider the merits of their application pending intensive study and discussion with the County "during the coming months." A letter from the County similarly indicated that negotiations between the two entities were continuing. The proper inference from both communications is not only that an agreement was possible, but even likely.[1] Appellants never offered any evidence below to rebut this inference, nor did they offer any support for their allegations that the two entities reached an impasse. Under these circumstances it is obvious to us that Appellants failed to satisfy their burden of showing that their application for a connection to the City's sewer system was rejected in a final, definitive decision.

[4] Appellants' claim for the taking of their property without just compensation is, obviously, not ripe for these same reasons. Neither the City nor the County reached final, definitive positions rejecting either of Appellants' two alternaive proposals for obtaining sewer service to their property. Until both alternatives were foreclosed, Appellants certainly could not have been deprived of "all use of [their] property," as they allege in their complaint. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 322 (1987). This conclusion obviates any need for us to consider Appellants' additional argument that their failure to exhaust state remedies for obtaining compensation for inverse condemnation is excused because that remedy was inadequate in California at the time they initiated their suit. *Cf. Kinzli*, 818 F.2d at 1456 (discussing adequacy of California procedures and remedy for inverse condemnation).

---

[1] Appellants do not suggest that their takings claim is based on a considerably "excessive delay" in the application process, and would find it impossible to do so because, as we have stated before, a delay of up to eight years may still be inadequate to satisfy the ripeness requirement. *See Kinzli*, 818 F.2d at 1454 n.5.

IV

The district court properly dismissed Appellants' complaint under Fed. R. Civ. P. 12(b)(1) on the ground that their claims were not ripe for adjudication.

AFFIRMED.

In the United States District Court
for the Eastern District of California

No. CIV. 2-85-534-EJG

WILLIAM ST. CLAIR and
JOHN SHELTON,

Plaintiffs,

v.

CITY OF CHICO, COUNTY OF
BUTTE, et al.,

Defendants.

BEFORE THE HONORABLE EDWARD J. GARCIA,
U.S. DISTRICT JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS
FRIDAY, FEBRUARY 12, 1988

JAMES G. VINE, CSR, License No. 1515

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THE COURT: This case was on calendar on October 9, 1987, on plaintiff's motion to amend under Rule 15(a) to add a second cause of action alleging a taking of their property, quote, without due process, unquote, based on two then recent Supreme Court cases involving land use regulations and that was Nollan against California Coastal Commission and First English Evangelical Lutheran against County of Los Angeles. Defendant, City of Chico, opposed the motion on procedural and abstention grounds without addressing the substantive basis for plaintiff's motion, that is, without addressing the applicability of the cited recent cases to plaintiff's claims and, in fact, one of the defendants, the County of Butte, filed nothing in opposition and didn't oppose. We, thus, granted the motion without prejudice to any motion defendants might bring to dismiss the amended complaint, thus, leaving for another day, that is, today, a full analysis of plaintiff's, quote, taking without due process claim, unquote. We expressly modified the law and motion schedule to allow time for defendants to address motions to the amended complaint that was ordered filed. Both defendants now move to dismiss the two causes of action pled in the third amended complaint on several alternative theories for lack of subject matter jurisdiction and for failure to state a claim. Because I agree with defendants' argument that the complaint should be dismissed for lack of ripeness, I do not reach the other alternative bases urged for dismissal, except to note that the motion to amend was probably improvidently granted by this Court because it appears that the cases of Nollan against California Coastal

Commission does not support plaintiff's cause of action for, quote, taking without due process, unquote, as alleged. Because the Court on these motions has considered exhibits outside the complaint, it grants both defendants' motions to dismiss pursuant to Federal Rule 12(b)(1) for lack of subject matter jurisdiction.

The Court finds that the two Supreme Court cases cited by defendants, McDonald against Yolo County and Williamson against Hamilton Bank, dispositive on this issue of ripeness finding that there is no judicable controversy because there has been no final determination by either defendant on plaintiff's sewer permit application. There being no judicable controversy, this Court lacks subject matter jurisdiction. Plaintiffs' only response to defendants' lack of ripeness argument is a futility defense, however, the Ninth Circuit, Kinzli against City of Santa Cruz case, cited by defendants, is dispositive on this contention. This case clearly held under similar circumstances that plaintiffs have not demonstrated futility. Defendants' 12(b)(1) motions are granted as to both causes of action pled in this third amended complaint, the Fifth Amendment taking claim and the Fourteenth Amendment equal protection claim. On the dismissal of this latter cause of action, see also Herrington against County of Sonoma, cited by defendant Butte County.

Supreme Court, U.S.
FILED
NOV 15 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-600

In The

Supreme Court of the United States

October Term, 1989

WILLIAM ST. CLAIR and JOHN SHELTON,

Petitioners,

v.

CITY OF CHICO and COUNTY OF BUTTE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. In considering the jurisdictional question of ripeness in a land-use case, is the District Court required to allow additional time for further discovery when controlling facts are contained in the allegations of plaintiffs' third-amended complaint and in undisputed documents in the court record?

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No. 89-600

In The

Supreme Court of the United States

October Term, 1989

WILLIAM ST. CLAIR and JOHN SHELTON,

Petitioners,

v.

CITY OF CHICO and COUNTY OF BUTTE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Accurate reproductions of the Court of Appeal decision and the reporter's transcript of the judge's ruling in the District Court are set forth in the Appendices to the Petition for Writ of Certiorari filed in this Court. Respondent City of Chico attaches reproductions of the Order Granting Defendants' Motions to Dismiss Plaintiffs' Third Amended Complaint as Appendix I, and of the additional documents cited to the District Court as Appendix II.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment, United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment, United States Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the person injured in an action at law, suit in equity, or

other proper proceeding for redress. For purposes of this section, any Act of Congress applicable exclusive to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Plaintiffs William St. Clair and John Shelton filed this action on April 10, 1985 alleging violation of their due process and equal protection rights under 42 U.S.C. § 1983. Following various motions to dismiss, intervening discovery, and a motion to amend the complaint, plaintiffs filed a third-amended complaint in October 1987 claiming an unconstitutional taking of their property and violation of equal protection. Motions to dismiss by defendants City of Chico and County of Butte challenging *inter alia* lack of subject matter jurisdiction under Rule 12(b)(1) were heard on February 12, 1988. In ruling on defendants' motions to dismiss, the District Court considered the allegations of the complaint and documents placed in the court record by plaintiffs' counsel as factual support for their motion to allow filing of a third-amended complaint.

During the interim between filing of defendants' motions and the hearing by the District Court, depositions were scheduled and then continued by agreement of the parties. Plaintiffs never disputed the accuracy of the documents which they themselves put before the court, nor did they submit any additional documents or affidavits to refute defendants' challenge to jurisdiction.

Upon review of the undisputed facts of the case, the trial court concluded that this Court's decisions in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985) and *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, *reh'g. den.*, 107 S.Ct. 22 (1986) are dispositive and that plaintiffs' claims are not ripe for review because no final decision was ever obtained from the City or the County regarding sewer connection for plaintiffs' proposed development. The court also found that plaintiffs' failure to take all necessary steps to obtain sewer service and receive a final decision from defendants was not excused by the futility exception, citing the Ninth Circuit case of *Kinzli v. City of Santa Cruz*, 818 F.2d 1449 (9th Cir. 1987).

The United States Court of Appeal for the Ninth Circuit agreed that the claims of the plaintiff developers were not ripe because neither the City nor the County had reached final definitive positions on plaintiffs' proposals for obtaining sewer service. The Appellate Court pointed to the undisputed material in the record which showed that discussions between the County and the City were continuing in regard to the land-use concerns raised by the City. The City wanted these concerns addressed prior to hook-up of the development to the City sewer system.

Plaintiffs' proposed Ravenwood project, containing 328 residential units, was located in the unincorporated area of Butte County outside the City's Sphere of Influence. After applying to the County for approval of a zoning change and a proposed tentative map, developers filed a general information application to the City inquiring as to possible sewer connection. In a letter dated

April 4, 1983 (Appendix II, attached as part of Exhibit B to the declaration of plaintiffs' counsel David M. Coyne) the City Director of Public Works informed the plaintiffs that while there was sufficient capacity in a trunkline then under construction for potential hookup to the City's sewer system, plaintiffs would have to fulfill several prerequisites. These prerequisites included amendment of the City's Sphere of Influence to allow annexation of the property to the City. Annexation could not occur until the property was within the City's Sphere of Influence. California Government Code § 56375.5. Amendment to the City's Sphere of Influence to include the property, as well as the annexation itself, could only be approved through LAFCO, the Local Agency Formation Commission. LAFCO was made up of representatives of the City, the County and the general public. California Government Code § 56325. Neither the City nor the County had a controlling vote on LAFCO and therefore could not have blocked approval of an application by plaintiffs, had one been made, for a change to the Sphere of Influence and annexation of the property. Plaintiffs never applied for annexation to the City.

Before ordering an amendment to a sphere of influence, LAFCO would have had to consider the comments of affected local agencies as well as multiple land-use issues, such as capacity and adequacy of public services for future development. If the developers had pursued the filing of an application for annexation, the City would have had an additional forum within which to address its concerns in regard to urban development and land-use. These concerns had been stated by the City Council during its initial consideration of hook-up of the Ravenwood

project. (Appendix II, Exhibit C to Declaration of David M. Coyne, Letter to the Board of Supervisors from City of Chico Mayor, Karl Ory.)

As shown by other documents before the trial court, the City subsequently informed developers that it did not appear appropriate *at that time* to further consider connection of the Ravenwood project to the City's sewer system because the City was in the midst of studies and discussions with the County regarding development of a unified land-use plan and approval and financing of master sewer and storm drainage plans. (Appendix II, Exhibit E to Declaration of David M. Coyne.) Far from informing developers that future sewer connection would be impossible, the City suggested further pursuit of the matter, acknowledging in a letter to developers that they would, "want to continue to monitor the progress of the discussions between the City and the County on these matters in the coming months." (Appendix II, Exhibit E to Declaration of David M. Coyne.)

Contrary to incorrect conclusions contained in petitioners' statement of the case, negotiations between the City and the County to resolve land-use concerns were continuing, and the City never approved nor rejected plaintiffs' application for City sewer service. Furthermore, the developers did not apply for annexation to the City, and therefore never sought to obtain a final decision as to sewer connection. The clear facts of the case show that petitioners' claims did not present a justiciable controversy and were not ripe for adjudication in the federal courts.

REASONS WHY PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

I

The District Court Followed Established Procedure In Finding That Petitioners' Complaint Lacked Subject Matter Jurisdiction

A factual attack on a complaint under Rule 12(b)(1) challenges the existence of subject matter jurisdiction in fact, and matters outside the pleadings are considered. *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507 (5th Cir.), *cert. den.*, 449 U.S. 953 (1980). The Court is not restricted to the face of the pleadings but may inquire into facts as they exist by reviewing any evidence regarding jurisdiction. *Land v. Dollar*, 330 U.S. 731 (1947). The district court may consider any evidence submitted on the issue, and the burden is on the party alleging jurisdiction. *Western Transportation Co. v. Couzens Warehouse & Distributors, Inc.*, 695 F.2d 1033, 1038 (7th Cir. 1982). In *Western Transportation Co. v. Couzens Warehouse*, plaintiff failed to respond to facts submitted by defendant challenging the court's jurisdiction; and the action was properly dismissed. In the present case petitioners did not and could not dispute the facts asserted by respondents below because those facts had been placed in the record by petitioners themselves. The issue of ripeness does not involve the merits of a plaintiff's claim under 42 U.S.C. § 1983, but is a rather threshold, jurisdictional issue, going to the Court's power to hear the case. *See Thornhill Publishing Co. v. GTE Corp.*, 594 F.2d 730, 733 (9th Cir. 1979).

Belatedly, plaintiffs scream that they did not have sufficient time to conduct discovery to refute the jurisdictional challenge. However, as the Ninth Circuit pointed out in reviewing this case, discovery is necessary only if it is possible that plaintiffs can demonstrate the requisite jurisdictional facts if afforded that opportunity. *See Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 430 n.24 (9th Cir. 1977.) The District Court here had all the information it needed to make a ruling on the issue of ripeness. The controlling questions of fact contained in allegations of the third-amended complaint and in documents submitted by plaintiffs were undisputed; therefore, further discovery would have been a useless waste of time. Plaintiffs had sufficient opportunity during the pendency of the action to conduct adequate discovery and to submit evidence to the trial court to carry their burden on the jurisdictional issue. The case was filed in 1985, followed by several motions on jurisdictional grounds. Defendants' final motions to dismiss were not heard until February 1988.

Petitioners argue that under the holding in the case of *Bell v. Hood*, 327 U.S. 678 (1946) this case should not be dismissed without consideration of its merits. Petitioners assert that the standard of review for jurisdictional questions in intertwined cases, where the merits cannot be separated from jurisdiction, should be equally applicable to land-use cases involving issues of ripeness. Extension of this type of jurisdictional review to land-use cases would destroy the effectiveness of the whole ripeness doctrine. The necessity of a final decision by the government which inflicts a concrete harm on the plaintiff landowner prevents premature adjudication where the full

extent of regulation has not yet been finally fixed. *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1453 (9th Cir. 1987). The issue of ripeness has nothing to do with the merits of claims challenging land-use regulation. Dismissal of a land-use case as unripe does not address the merits of the claims. See *MacDonald, Sommer & Frates v. Yolo County*, 447 U.S. 340, 352-53; *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 185 (1985). A jurisdictional attack which does not implicate merits of a federal cause of action is not bound by the strict *Bell v. Hood* standard. *Williamson v. Tucker*, 645 F.2d 404, 415 n.9 (5th Cir. 1981).

II

The Holding That This Case Is Not Ripe For Review Is Consistent With Federal Law And Does Not Present An "Injustice" That Should Be Settled By This Court

Petitioners concede that the Ninth Circuit has established appropriate standards for application of the jurisdictional requirement of a final agency decision. According to the test developed in *Kinzli v. City of Santa Cruz*, 818 F.2d 1449 (9th Cir. 1987), modeled on this Court's opinion in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), and since followed in other cases:

> [T]he "final decision" which inflicts a concrete injury on the plaintiff and is ripe for adjudication as a claim of a regulatory taking, even if the claim is brought under 42 U.S.C. section 1983, requires at least two decisions against [landowners]: (1) a rejected development plan, and (2) a denial of a variance.

Kinzli, 818 F.2d at 1454. In the present case developers admittedly failed to pursue annexation of their property to the City which they knew to be an explicit prerequisite to the sewer connection. In so doing, they failed to make a "meaningful application" as is required before a takings claim is ripe for adjudication. *Id.* at 1454-55. In the absence of any attempt to annex the property, sewer connection was impossible. As the trial court correctly recognized, developers simply did not take all the steps necessary to obtain a final decision. Moreover, as is obvious from a review of the documents attached to the declaration of plaintiffs' counsel and considered by the court, discussions between the City and County as to resolution of land-use concerns were ongoing. These concerns which had been expressed by the City Council when the Ravenwood Project was first brought to its attention involved consistency of the City and County general plans and Spheres of Influence, urban boundaries and proposed future zoning. In considering extension of sewer service to an area in an unincorporated section of the County and not within the City's Sphere of Influence, the City quite naturally and legitimately wanted to explore the impact of this action on future land-use issues, including urban growth and provision of City services. As shown by the documents before the District Court, the City and County were close to resolving these matters prior to the filing of plaintiffs' complaint.

Petitioners assert that the futility exception applies because they claim that the City and County had reached an impasse. The futility exception is allowed only where litigants can demonstrate that further attempts to develop the property would have been futile. *Kinzli v. City of Santa*

Cruz, 818 F.2d at 1454. To invoke the futility exception, landowners bear a heavy burden. *Lake Nacimiento Ranch Co. v. County of San Luis Obispo*, 830 F.2d 977, 980 (9th Cir. 1987). "[M]ere allegations by a property owner that it has done everything possible to obtain acceptance of a development proposal will not suffice to prove futility." *Herrington v. County of Sonoma*, 857 F.2d 567, 570 (9th Cir. 1988); *Unity Ventures v. County of Lake*, 841 F.2d 770, 776 (7th Cir. 1988).

The *Herrington v. County of Sonoma* case cited by petitioners presented a substantially different situation for analysis of jurisdiction. In the *Herrington v. County of Sonoma* case, evidence at trial showed that the only way the landowners could obtain approval for their project would have been to seek a General Plan Amendment which, by testimony of a County employee, they would have had "no chance of obtaining." *Id.* at 1496.

The Seventh Circuit decision in *Unity Ventures v. County of Lake*, 841 F.2d 770 (7th Cir. 1988), presents a similar situation to this case. A developer had submitted plans to the County for connection to its sewer system. The County approved the plans, but the Village of Grayslake, the approval of which was required under a Sphere of Influence Agreement, refused to consent to the connection. *Id.* at 773. The developer was told informally by the mayor that the village would not consent to connection *at that time* because of concerns about the capacity of the sewer. *Id.* Basing its decision on the Ninth Circuit doctrine developed in *Kinzli* and *Herrington*, the Seventh Circuit Court of Appeals held that the case was not ripe because the developer had not submitted a formal application and had never received a final decision on the

sewer connection. Although the developer argued that further pursuit of sewer connection would have been futile, the court held that it was simply impossible to tell ultimately what actions would have been taken on a formal application.

Similarly, the developers in this case failed to apply for the necessary annexation of their property to the City of Chico. Therefore, petitioners never made a "meaningful application." *Kinzli*, 818 F.2d at 1454-55. Also, like the developer in *Unity Ventures*, petitioners had only been told that connection was not appropriate *at that time*, while the City and County were still looking at land-use and sewage facilities. No final decision had been made.

As these cases demonstrate, there is no conflict in procedure utilized by the courts for considering the ripeness of a land-use claim. Each case must be assessed individually, on its own facts and circumstances. Sufficient precedent exists as guidance for the district courts in making a determination as to whether or not there has been a final decision.

In the case of *Havens Realty Corp. v. Coleman*, 455 U.S. 362 (1982) this Court addressed the issue of standing and found that the plaintiff in that case deserved an additional opportunity to amend the complaint. This Court specifically pointed out, however, in the *Havens* opinion that if the petitioner could not allege sufficient facts in his pleading to state an injury in fact and meet the standing requirements established by prior decisions, the complaint should be dismissed. (*Id.* at 378.) Even if the *Havens Realty Corp. v. Coleman* case were on point, it would not

assist petitioners in this action. The decision by the District Court in this case was made on the basis of allegations contained in plaintiffs' third-amended complaint and on facts submitted to the court by petitioners themselves. The court made no findings of fact, nor resolved any disputed factual issues, as it was not necessary to do so. The facts before the District Court were uncontradicted and formed an appropriate basis for assessing whether or not the claim was ripe for adjudication.

CONCLUSION

For all of the reasons set forth herein and based on all of the foregoing authorities, it is respectfully requested that this Court deny the petition for writ of certiorari.

DATED: November 13, 1989

Respectfully,

BOLLING, WALTER & GAWTHROP

By: CAROLEE KILDUFF
Attorneys for Respondent
City of Chico

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

WILLIAM ST. CLAIR and JOHN SHELTON, Plaintiffs, v. CITY OF CHICO and COUNTY OF BUTTE, Defendants.	No. Civ. S 85-0534 EJG ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS PLAINTIFFS' THIRD AMENDED COMPLAINT

This matter was before the court on February 12, 1988 for hearing on defendants' motions to dismiss plaintiffs' third amended complaint. David M. Coyne of Gray, Plant, Mooty, Mooty & Bennett appeared on behalf of the plaintiffs. Carolee Weber of Bolling, Walter & Gawthrop appeared on behalf of defendant City of Chico. E. Clement Shute, Jr. of Shute, Mihaly & Weinberger appeared on behalf of defendant County of Butte. Upon consideration of the moving and opposing papers and the oral argument of counsel, the court enters the following order.

Plaintiffs' claims under Section 1983 of the Civil Rights Laws (42 U.S.C. § 1983) are not ripe for adjudication and are dismissed ~~with prejudice~~ for lack of subject matter jurisdiction (Fed. Rule of Civil Proc. ("FRCP") 12 (b)(1)). The court finds that the Supreme Court's decision in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985) and *MacDonald, Sommers & Frates v. Yolo County*, 106 S. Ct. 2561 (1986), as well as the Ninth Circuit's decisions in *Kinzli v. City of Santa*

Cruz, 818 F.2d 1449 (9th Cir. 1987), and *Herrington v. County of Sonoma*, Nos. 86-2620, 86-2728 (9th Cir. Dec. 24, 1987), are dispositive, demonstrating that no justiciable controversy has been presented herein because plaintiffs have not received a final decision from defendants regarding sewer connection.

The court further finds that plaintiffs' failure to take all necessary steps to obtain sewer service and thus to receive a final decision from the defendants is not excused by the futility exception to the finality doctrine. In this regard, the Ninth Circuit's decision in *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, is dispositive.

Finally, given this disposition of the case, the court does not reach defendants' arguments that the taking claim alternatively should be dismissed because of the existence of an adequate state procedure for the remedy of plaintiffs' alleged injuries (FRCP 12(b)(1)) or because of plaintiffs' failure to state a claim upon which relief can be granted (FRCP 12(b)(6)).

IT IS SO ORDERED.

DATED: 3/10/88

/s/ Ed. J. Garcia
EDWARD J. GARCIA, JUDGE
UNITED STATES DISTRICT COURT

016.txt/BUTTE

DECLARATION OF SERVICE BY MAIL

Re: *Case No. Civ. S 85-0534 EJG*

I, the undersigned, certify and declare that I am a citizen of the United States, over the age of 18 years, employed in the City and County of San Francisco, State of California, and not a party to the above-entitled cause. On November 20, 1987, I served a true copy of the within

PROPOSED ORDER GRANTING DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' THIRD AMENDED COMPLAINT

by depositing said document(s) in the United States Mail at San Francisco, California, in a sealed envelope with the postage thereon fully prepaid addressed to the following:

Joseph M. Alioto
ALIOTO & ALIOTO
650 California Street
23rd Floor
San Francisco, CA 94108

Daniel R. Shulman
David M. Coyne
GRAY, PLANT, MOOTY, MOOTY & BENNETT
3400 City Center
33 South Sixth Street
Minneapolis, MN 55402

Laurence L. Angelo
BOLLING, WALTER & GAWTHROP
7919 Folsom Blvd., Ste. 300
P.O. Box 255200
Sacramento, CA 94104-2105

I do hereby certify that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 19, 1988, at San Francisco, California.

/s/ David Kelley
DAVID KELLEY

ALIOTO & ALIOTO
Joseph M. Alioto
650 California Street
23rd Floor
San Francisco, California 94108
Telephone: (415) 434-2100

GRAY, PLANT, MOOTY, MOOTY & BENNETT
Daniel R. Shulman
David M. Coyne
3400 City Center
33 South Sixth Street
Minneapolis, Minnesota 55402
Telephone: (621) 343-2800

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

WILLIAM ST. CLAIR and JOHN SHELTON, Plaintiffs, v. CITY OF CHICO and COUNTY OF BUTTE, Defendants.	)	No. Civ. S 85-0534 EJG *DECLARATION OF DAVID M. COYNE*

I, David M. Coyne, depose and state that:

1. I am one of the attorneys representing plaintiffs William St. Clair and John Shelton in the above-entitled matter.

2. Attached hereto as Exhibits A through E are copies of documents obtained in this matter through discovery.

3. Exhibit A is a copy of a letter dated March 25, 1983, showing the approval of plaintiffs' application for a zoning change to permit the construction of the Ravenwood project. Condition 27, on page 3 of that letter, requires that plaintiffs "Hook up to the santiary sewer, City of Chico."

4. Exhibit B is copies of plaintiffs' application for a sewer connection, together with two letters from the City of Chico indicating that sewer capacity was available for the connection of the Ravenwood project to the City sewer system, and specifying the conditions therefor.

5. Exhibit C is a copy of a letter dated September 29, 1983 from Karl E. Ory, Mayor of the City of Chico, stating additional conditions imposed for approval of connection of the Ravenwood project to the City sewer system.

6. Exhibit D is copies of letters from the California Regional Water Quality Control Board and the Butte County Planning Commission, stating that plaintiffs' proposed sewage treatment facility met those agencies' standards.

7. Exhibit E is copies of a memorandum and letter reflecting the inability of plaintiffs to construct the Ravenwood project, as a result of defendants' actions.

8. These documents support the primary factual statements made in plaintiffs' "Background" section of their Memorandum in Support of Motion for Leave to Amend Complaint.

Dated: October 2, 1987

/s/ David M. Coyne
David M. Coyne

7235F

EXHIBIT A

BUTTE COUNTY

PLANNING COMMISSION

7 COUNTY CENTER DRIVE –
OROVILLE, CALIFORNIA 95965
PHONE 534-4601

March 25, 1983

John Shelton and
Bill St. Clair
1704 Mangrove Ave.
Chico, Ca.
95926

Re: Rezone File 82-19

Gentlemen:

Regarding the project described below:

"John Shelton and Bill St. Clair – Rezone from "A-SR" (Agricultural-Suburban Residential and "SR-1" (Suburban Residential – 1 acre parcels) to "PA-C (Planned Area-Cluster) to allow the development of a 361 unit residential development on 85 acres with an evaporative sewage disposal system on 75 acres on property located on both sides of Sycamore Creek, on the north side of Eaton Road, approximately 2000 ft. east of State Highway 99, identified as AP 44-04-100, 101 and 102"

the Planning Commission, at their meeting on March 24, approved the "PA-C" zoning on that portion south of Sycamore Creek, subject to the following conditions:

1. Submit road and drainage plans to the Department of Public Works for approval and install the required facilities.
2. Provide 20 ft. radius property line returns at all street intersections.
3. Provide right-of-way for standard S-5 at all street intersections.
4. Indicate a 55-ft. building setback line from the southerly line of the west bound lanes of Eaton Road.
5. Street signs shall be provided by the developer at all street intersections per County requirements. (Submit 5 alternate street names for each street to the County Address Coordinator for approval of street names.)
6. Deed 69 feet from the existing right-of-way line of Eaton Road to the County of Butte.
7. Construct full street section on all interior streets. Interior streets shall be 20 feet in width, paved with 2" AC, 4" Class II aggregate base.
8. Provide monumentation as required by the Department of Public Works in accordance with accepted standards.
9. Street grades and other features shall comply with the Butte County Ordinances, design resolution and other accepted engineering standards.
10. Provide permanent solution for drainage.
11. All easements of record to be shown on the final map.

12. Meet requirements of Butte County Fire Department or other responsible agency.

13. Street lighting shall be provided in accordance with Butte County requirements, accepted design criteria, and recommendations of PG&E.

14. Submit site development plan to Department of Public Works for approval and construct or install the required facilities.

15. Provide 1 ft. no access strip along Eaton Road except at interior streets.

16. Pay off assessments.

17. Meet the requirements of the utility companies (i.e., PG&E, Pacific Telephone, water, sewer).

18. Pay any delinquent taxes.

19. File a tentative and final subdivision map and pay appropriate fees.

20. Move interior streets to line up with future centerlines of Codman Avenue and Morseman Avenue.

21. Developer shall provide all required traffic safety signs including stop signs.

22. Developer shall pay pro-rata share toward installation of traffic signal at intersection of Hicks Lane and Eaton Road.

23. Construct full street section on future west bound lanes of Eaton Road to 32 ft. face of curb to face of curb (no parking) with vertical curb, gutter, sidewalk and 2" AC, 12" AB, SC 250 prime, fog seal and 95% relative compaction.

24. Construct one-half street section plus 12 feet on existing Eaton Road (future east bound

lanes) to 32 ft. face of curb to face of curb (no parking) with vertical curb, gutter, sidewalk and 2" AC, 12" AB, SC 250 prime, fog seal and 95% relative compaction.

25. Provide a letter or other documentation from the California Water Service Company stating that they are willing and able to supply domestic water to the property.

26. Destroy under permit any water wells within the property boundaries proposed to be abandoned. Provide compliance with the Butte County Water Well Ordinance for any wells not proposed for abandonment.

27. Hook up to sanitary sewer, City of Chico.

28. Install and maintain landscaping per approved landscape plan.

29. Building permit applications for residences in this subdivision shall be subject to any school mitigation fees estalished by an ordinance enacted prior to the filing of such application, or a community facilities act of 1982 district will be created pursuant to California Government Code Section 53311, et. seq., covering the project area prior to the issuance of any building permits.

30. Form a homeowner's association to maintain the mini-park and other lands owned in common.

31. Form and/or participate in a drainage maintenance district for Sycamore Creek/Mud Creek.

32. Comply with recommendations of the Butte County Mosquito Abatement District to minimize the potential for mosquito breeding from standing water in the Sycamore Creek Channel.

33. Record an air avigation easement on the property. Place a statement on the final map that the property is subject to aircraft noise.

34. Limit building height to two-story to insure no possible conflict with air approaches.

35. Applicant must also comply with all other applicable State and local statutes, ordinances and regulations.

A report of this action will be made to the Board of Supervisors on April 5 at which time they will set a public hearing. You will be notified of that date.

Please feel free to contact our office, if you have any questions.

Sincerely,

/s/ B. A. Kircher
B. A. Kircher
Director of Planning

/hd

cc: Cal Bachman & Associates
1704 Mangrove Ave.
Chico

EXHIBIT B

(PURSUANT TO CHAPTER 15.36 OF THE CHICO MUNICIPAL CODE)

SECTION 1 – NOTICE TO APPLICANT

THE SEWER CONNECTION CHARGED QUOTED HEREON IS THAT FEE PAYABLE TO THE CITY OF CHICO FOR THE PRIVILEGE OF CONNECTING TO THE CITY SEWER SYSTEM AND AS REIMBURSEMENT TO THE CITY FOR ITS CAPITAL COSTS IN CONSTRUCTING THE PRESENT SEWER SYSTEM, AS WELL AS FOR ANY FUTURE ADDITIONS THERETO. IT DOES NOT INCLUDE ADDITIONAL COSTS WHICH THE APPLICANT MAY INCUR UNDER PRIVATE CONTRACT AT HIS FULL COST FOR INSTALLATION OF NECESSARY MAIN LINE OR LATERAL EXTENSIONS, MANHOLES, AND SIMILAR APPURTENANT STRUCTURES AS MAY BE REQUIRED.

THE SEWER CONNECTION CHARGE QUOTED HEREON SHALL BE VALID FOR A PERIOD OF SIXTY (60) DAYS OR UNTIL THE EFFECTIVE DATE OF ANY AMENDMENTS TO THE CITY'S SEWER CONNECTION CHARGES, WHICHEVER IS LONGER. ANY AMENDMENTS TO THE CITY'S SEWER CONNECTION CHARGES BECOME EFFECTIVE ON JULY 1 OF EACH YEAR.

SECTION II – APPLICANT USE

A. Owner: John Shelton

Address:

Home Phone:

Bus. Phone:

B. Applicant: Cal Bachman

Address: 3012 Esplanade

Chico

Home Phone:

Bus. Phone: 342-4136

C. Reason for Initiating Application:

[ ] Application for Plan Check Bldg. Plan No. DNA

[ ] Subdivision Map (5 or more lots)

[X] General Information

D. Property to be Served:

1. Address: Eaton RD. (Raven Wood Subd.)

2. A. P. No(s): 44-04-102

3. Existing Use:

a. [X] Vacant

b. [ ] Residential No. of Units:

c. [ ] Non-Residential description of Use:

4. No. of Residential Unites to be Added to the Property: 328

5. Total Number of Unites to be Served: 328

Mail Completed Sewer Connection Application to:

[ ] Owner [X] Applicant

Submitted by:

/s/ Calvin W. Bachman
Signature of Owner/Applicant
Date 3/7/85

Application Fee Paid: $20.00 Official Receipt NO.. 66076 Date: 3/7/83

APPLICATION NO.
1983

(PURSUANT TO CHAPTER 15.36 OF THE CHICO MUNICIPAL CODE)

SECTION 1 – NOTICE TO APPLICANT

THE SEWER CONNECTION CHARGED QUOTED HEREON IS THAT FEE PAYABLE TO THE CITY OF CHICO FOR THE PRIVILEGE OF CONNECTING TO THE CITY SEWER SYSTEM AND AS REIMBURSEMENT TO THE CITY FOR ITS CAPITAL COSTS IN CONSTRUCTING THE PRESENT SEWER SYSTEM, AS WELL AS FOR ANY FUTURE ADDITIONS THERETO. IT DOES NOT INCLUDE ADDITIONAL COSTS WHICH THE APPLICANT MAY INCUR UNDER PRIVATE CONTRACT AT HIS FULL COST FOR INSTALLATION OF NECESSARY MAIN LINE OR LATERAL EXTENSIONS, MANHOLES, AND SIMILAR APPURTENANT STRUCTURES AS MAY BE REQUIRED.

THE SEWER CONNECTION CHARGE QUOTED HEREON SHALL BE VALID FOR A PERIOD OF SIXTY (60) DAYS OR UNTIL THE EFFECTIVE DATE OF ANY AMENDMENTS TO THE CITY'S SEWER CONNECTION CHARGES, WHICHEVER IS LONGER. ANY AMENDMENTS TO THE CITY'S SEWER CONNECTION CHARGES BECOME EFFECTIVE ON JULY 1 OF EACH YEAR.

SECTION II – APPLICANT USE

A. Owner: John Shelton

Address:

Home Phone:

Bus. Phone:

B. Applicant: Cal Bachman

Address: 3012 Esplanade

Chico

Home Phone:

Bus. Phone: 342-4136

C. Reason for Initiating Application:

[ ] Application for Plan Check Bldg. Plan No. DNA

[ ] Subdivision Map (5 or more lots)

[X] General Information

D. Property to be Served:

1. Address: Eaton RD. (Raven Wood Subd.)

2. A. P. No(s): 44-04-102

3. Existing Use:

a. [X] Vacant

b. [ ] Residential No. of Units:

c. [ ] Non-Residential description of Use:

4. No. of Residential Unites to be Added to the Property: 328

5. Total Number of Unites to be Served: 328

Mail Completed Sewer Connection Application to:

[ ] Owner [X] Applicant

Submitted by:

/s/ Calvin W. Bachman
Signature of Owner/Applicant
Date 3/7/85

Application Fee Paid: $20.00 Official Receipt NO.. 66076 Date: 3/7/83

APPLICATION NO.
1983

A. *Property Information:*

1. In City [ ] Yes [X] No
2. In City as of June 18, 1982 (Including Annexation No. 384): [ ] Yes [X] No
3. Within City Sewer Service Area: [ ] Yes [X] No
4. Annexable: [ ] Yes [X] No [ ] DNA
5. Existing Zoning: D/N/A County
6. Front Footage: 2652.82 l.f. (SHORTEST SIDE – 60 L.F.MIN.)
7. Property Area: 85 acres
8. No. of Residential Units Presently Connected to Sewer: -0-
9. No. of Non-Residential Acres Presently Connected to Sewer: –
10. Property in a Sewer Assessment District: [X] No. [ ] Yes. Name:
11. Subject to NECSAD Reimbursement Agreement: [X] Yes [ ] No
12. Main Extension Required: [ ] No [X] Yes. Estimated Cost $780,000
13. Prior Sewer Connection Fees *Paid* for:

    a. Trunk Line Capacity Fee:

       No. of Units -0- No. of Acres –

    b. Water Pollution Control Plant Fee

       No. of Units -0- No. of Acres –

    Sewer Main Installation Fee:

       Front Footage -0- l.f.

14. Subject to *Additional* Sewer Connection Fees for:

    a. Trunk Line Capacity Fee:

       No. of Units 328

    b. Water Pollution control Plant Fee:

       No. of Units 328

    c. Sewer Main Installation Fee:

       Front Footage -0- lf

B. *Computation of Applicable Sewer Connection Fees:*

1. Trunk Line Capacity Fee: (units)328 x $750 = $ 246,000
2. Water Pollution Control Plant Capacity Fee: (units)328 x $750 = $ 246,000
3. Sewer Main Installation Fee:
   [ ] $20/front foot x l.f. $ DNA
   [X] DNA
4. Less Application Fee (*if connection fees paid within 60 days of the date of city Response letter.)* $(20.00)
5. NET ADDITIONAL SEWER CONNECTION FEE: $ 491,980

DEPARTMENT
OF PUBLIC WORKS

Fifth and Main Street
P.O. Box 3420
Chico, CA 95927
(916) 895-4891
ATSS 459-4891

April 4, 1983

DPW Chrono/Subd.

Cal Bachman
3012 Esplanade
Chico, California 95926

Attn: Cal Bachman

Re: City of Chico Department of Public Works Application for Sewer Connection No. 1983 – Ravenwood Subdivision (PUD)

Gentlemen:

Reference is made to the above noted application for sanitary sewer connection submitted by your organization to this office for processing and to the subsequent conversation by Mr. Bob Nunes of this office with you relative to estimate of costs for sewer service to same.

In compliance with your request the following comments are made relative to availability of sewer service to this property:

1. This office has determined that there is available capacity in the Northeast Chico Sanitary Sewer Assessment District trunk line currently under construction to serve this property, subject to the construction of a line extension from same to the property. (See enclosed copy of Sanitary Service

Application No. 1983 showing location, sizing, and estimate of costs for same along with applicable sewer connection fees.)

2. In order to obtain sanitary sewer service for this property an amendment to the City of Chico Sphere of Influence would be required. (Chico City Council and LAFCO)

3. Developer would be required to execute an annexation and sewer service agreement with the City of Chico, authorizing annexation of said property and payment of sanitary service connection fees.

If any additional information is required on this subject, please feel free to contact this office at your convenience.

Very truly yours,
/s/ A. J. Savitz,
A. J. Savitz, Director
Director of Public Works

AJS:cb

MUNICIPAL BUILDING

P.O. Box 3420
Chico, CA 95927
(916) 895-4800
ATSS 459-4800

Cal Bachman
3012 Esplanade
Chico, California 95926

Date: April 5, 1983

Re: Sewer Connection Application #1983

With respect to the Sewer Connection Application cited above, the sewer connection fee payable to the City, in the

event you determine to proceed with connection, will be $491,980.00. The connection fees quoted hereon shall be valid for sixty (60) days from the date of this letter or until the effective date of any amendment to the City's Sewer Fees, whichever is longer. Any amendments to the City's Sewer Connection fees become effective on July 1st of each year.

Should you desire to proceed with this connection, you should take the action marked with an "X" below. When these actions are completed, you may then contract with a license plumbing contractor, who may then secure the necessary permits from the Department of Public Works, and proceed with the desired connection.

XX Contact the City Planning Office in the Municipal Building, 5th and Main Streets, phone 895-4851, and execute a "City of Chico Annexation Petition" or "Annexation and Sewer Service Agreement", as appropriate, prior to proceeding with the sewer connection.

XX Pay the above noted connection fees, and secure the necessary permit from the Department of Public Works, second floor, Municipal Building, Main and 5th Streets.

XX Extend and pay for the necessary sewer extension required to service your property. In this regard, you may desire to execute with the City, a "Sewer Reimbursement Agreement". If so, please contact the Department of Public Works about such an agreement at your convenience.

___ No further action is necessary since connection fees were previously paid, except to secure required permits from the Department of Public Works.

___ This property is located outside of the City's sewer service area and is not eligible for connection to the City's sewer system.

A. J. SAVITZ, DIRECTOR
DEPARTMENT OF PUBLIC WORKS

/s/ By: M. Dale Shaddox
M. Dale Shaddox
Administrative Assistant
Phone: 895-4872

AJS:ce
Attachment: Sewer Application
Dist.S.S. Application Chrono File System
Building Folder: Eaton Rd. (AP 44-04-102)
Ravenwood Sub.
(XX) Planning Office

DPW
9/82

EXHIBIT C

OFFICE OF
THE MAYOR

P.O. Box 3420
Chico, CA 95927

(916) 895-4815
ATSS 495-4815

September 29, 1983

Board of Supervisors
County of Butte
25 County Center Drive
Oroville, CA 95965

Re: Urban development around Chico
Ravenwood development in NE Chico

As you know, a committee of the City Council and Board of Supervisors met on September 8 to review the above matters, with the understanding that reports would be submitted by committee members to the Board on September 13 and to the Council on September 20. It is our understanding, through news reports, that the Ravenwood project was approved by the Board, subject again to its connecting to the City's sewer system.

The City Council, at its September 20 meeting, accepted the committee's recommendation for approval of the Ravenwood project subject to the following:

1. That City and County staffs recommend new urban boundaries and sphere(s) of influence (i.e. Sycamore Creek north, Greenline west, Butte Creek south, foothill power lines east) for review and ratification by the Supervisors and Council. This urban zone would remain in place until the population within the zone reached 100,000 (or an agreed upon new population) or ten years.

2. That the City and County sponsor a Chico urban plan committee to review the City and County's general plans and bring them into conformity, and propose a comprehensive urban plan to be ratified by both bodies.

3. That the County adopt a policy whereby existing zoning outside the new urban zone would remain in place. All A-2 zoning within 3 miles of the urban zone to be rezoned with not less than 5 to 10 acre minimums.

4. That the Ravenwood project meet all City development and public improvement standards.

Since the City Council and Board of Supervisors wish this matter to be resolved at an early date, the Council asked

once again that its Intergovernmental Relations Committee meet with Supervisors Wheeler and Dolan in an effort to secure agreement on the matters outlined above. The Intergovernmental Relations Committee has indicated it will meet again on October 13 at 4:00 P.M. A copy of this letter is being provided to Supervisors Dolan and Wheeler and to the Chief County Administrative Officer.

Sincerely
/s/ Karl E. Ory
KARL E. ORY
Mayor

KEO:ic

cc: City Council (7)
City Clerk
City Manager

Public Works Director
Planning Director

Supervisor Dolan
Supervisor Wheeler

CCAO Nichols
Cal Bachman

EXHIBIT D

GEORGE DEUKMEJIAN, *Governor*

STATE OF CALIFORNIA – THE RESOURCES AGENCY

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD –
CENTRAL VALLEY REGION

3201 S STREET
SACRAMENTO, CALIFORNIA 95816-7080
PHONE: (916) 445-0270

8 February 1983

Mr. Cal W. Bachman, P.E.
Bachman & Associates Engineers
3012 The Esplanade
Chico, CA 95926

RAVENWOOD SUBDIVISION

At our meeting lask week, you submitted a revised proposal for a sewage treatment disposal system and requested my preliminary comments. From our initial review of the information, which you submitted, it appears that you have demonstrated the feasibility of using stabilization/evaporation ponds for the subject subdivision. After further review of your submittal, I will advise you of additional information requirements. We previously discussed the need for soil investigation demonstrating adequate depth of impervious soils in the pond area.

If you need additional information, please feel free to call me at (916) 322-1592.

/s/ Larry F. Kogh
for JOSEPH J. HENAO
Area Engineer

JJH:rar

cc: Butte County Health Department, Chico
Butte County Planning Commission, Oroville
Mr. William St. Clair, Chico

BUTTE COUNTY
LAND OF NATURAL WEALTH AND BEAUTY
PLANNING COMMISSION

7 COUNTY CENTER DRIVE – OROVILLE, CALIFORNIA
95965
PHONE 534-4601

July 22, 1983

John Shelton and
Bill St. Clair
1704 Mangrove Ave.
Chico, CA 95926

Re: Rezone File 82-19

Gentlemen:

Regarding the project described below:

"John Shelton and Bill St. Clair – Rezone from "A-SR" (Agricultural-Suburban Residential and "SR-1" (Suburban Residential – 1 acre parcels) to "AP-C" (Planned Area Cluster) to allow the development of a ~~361~~ 328 unit residential development on 85 acres with an evaporative sewage disposal system on 75 acres on property located on both sides of Sycamore Creek, on the north side of Eaton Road, approximately 2000 ft. east of State Highway 99, identified as AP 44-04-100, 101 and 102".

The planning Commission, at their meeting on July 21, determined that the alternative sewage disposal system would be a viable alternative subject to the following conditions:

1. Provide a letter or other documentation from the California Water Service Company stating that they are willing and able to supply domestic water to the project.

2. Destroy under permit, any water wells within the property boundaries proposed to be abandoned. Provide for compliance with

the Butte County Water Well Ordinance for any wells not proposed for abandonment.

3. Provide community sewage collection, treatment and disposal facilities that comply with California State Regional Water Quality Control Board, the Code of Butte County, California State Health and Safety Code and other applicable codes and regulations governing the design, construction, and operations of the facilities.

4. Provide a service and maintenance district, county service area, or other legal entity, not including a homeowners association, or entities adequate to insure the construction, maintenance, repair, or improvements to the community sewage collection treatment and disposal facilities.

5. Coordinate the installation of the pipeline beneath Sycamore Creek with the State Reclamation Board and Army Corps of Engineers.

6. That the Board of Supervisors not formally adopt this as an approved alternative until all efforts have been exhausted with the City of Chico to get approval of the hookup to the sewer system.

7. That the 50 acres lying northeast of Sycamore Creek be reincorporated into the PA-C.

A report of this action will be made to the Board of Supervisors on August 2, at which time they will set a public hearing. You will be notified of that date.

Please feel free to contact our office, if you have any questions.

Sincerely,
/s/ B. A. Kircher
B. A. Kircher
Director of Planning

/sb

cc: Cal Bachman & Associates
1704 Mangrove Ave.
Chico

EXHIBIT E

BOARD OF SUPERVISORS
ADMINISTRATION CENTER
25 COUNTY CENTER DR. -
OROVILLE, CALIFORNIA 95965

TELEPHONE: (916) 534-4224

Jane Dolan, Chair
Second District

Al Saraceni
First District

Hilda Wheeler
Third District

Bertha Moseley
Fourth District

Len Fulton
Fifth District

September 12, 1983

To: Board of Supervisors

From: Supervisor Wheeler

Subject: Greater Chico area land use issues - Ravenwood

At the September 8, 1983 Intergovernmental Relations Committee meeting, several points of discussion were raised about urban development in the Chico urban area in general, and about the appropriateness of the proposed Ravenwood PAC specifically. In a memorandum dated September 9, 1983, the Intergovernmental Committee has outlined the main points of discussion (copy attached). As per our agreement with the Council members present at the meeting, Supervisor Dolan and I are bringing these points forward for your consideration.

The Chico City Council will do the same at their September 20 meeting. In response to Councilman Nichols' three points of consideration, I would have the following comments:

1. *New urban boundaries in spheres of influence.* I would refer you to the Intergovernmental memorandum from county Planning staff dated November 17, 1981 regarding the General Plan Amendment for the Chico Area Land Use Plan, File #80-72. In it, staff points out that, historically, the City of Chico called for city – county cooperation in land use policy . . . in response, the Board selected Supervisors Dolan and Wheeler as a committee of two in early 1980 to work out an agreement with the City of Chico. Assisted by the Planning staffs of both agencies, the Board Committee and their City Council counterparts reached an agreement, endorsed by the full Board and the full Council in March of 1980. An EIR was prepared and circulated. I would point out to the Board at this time that the county has fulfilled its first obligation to the City of Chico in regard to cooperation in planning for the Chico urban area. Although the focus of the hearings most recently held for the county General Plan Amendment in the Chico area was on the Greenline, nevertheless, it did include consideration and modification of the northeast, east and south Chico areas as well. Now, following this Board's adoption of the appropriate General Plan Amendment, and based upon the agreement Supervisor Dolan and I reached with the Council members in 1980, I believe it would be appropriate for the City Council to follow through with General Plan revisions of their own. It is my understanding

that city staff is, in fact, scheduling hearings for this purpose in October with the city's Planning Commission. I would hope the present Commission and Council would bear in mind the recent history of the proposal currently before them, and continue in the spirit of cooperation that appears to be emerging today. County cooperation with the City of Chico has been, and continues to be, ongoing at least since 1980. For this reason, I would suggest that now the impetus for revision and conformity shift to the Chico City Council. Whatever proposals emerge from Council discussions can be considered at future Intergovernmental Committee meetings, and within the context of the county's recently amended Plan.

2. *Urban Plan Committee.* I believe the Intergovernmental Committee has already and is currently acting in the capacity of the proposed Urban Plan Committee. Further, city participation at the county Planning Commission level is serving to bring the two governmental bodies closer together. Therefore, the addition of another committee would be redundant. Conformity is currently being pursued and achieved with existing mechanisms.

3. *County policy regarding urban zoning.* This proposal would require a major revision in the county zoning ordinance and policy. Before considering adopting such a major revision, I believe certain questions need to be addressed:

   a. Fiscal analysis for services provided by city/county.

   b. Long range planning effects of 5/10 acre parcel splits.

c. Criteria for determining minimum parcel sizes, soil, drainage, zoning, water, etc.

d. The role of the county in land use decisions.

If the Board is interested in pursuing such a policy, I would propose it be accomplished after the city and county Land Use Plans are brought into conformity.

Ravenwood

In the midst of the above general discussion comes the question of the specific Ravenwood Project. Although it does not currently conform to the City's existing General Plan, it would conform to the revised Plan now being proposed at the city Planning Commission (low density residential). It has been determined that there is sufficient capacity in the city sewer system to service the project. Although the project does not currently lie within the city's sphere of influence, it does lie within the revised sphere proposed by Councilman Nichols (Sycamore Creek being the northerly boundary). Clearly there is a strong case to promote city sewer hookup for the project, given these facts and the neighborhood support for hookup. I believe sewer hookups would be the most acceptable answer for all concerned, and would encourage hookup. I have also followed through on my commitment of September 8 to approach this Board with city concerns for the northeast Chico area. However, I do not believe it is appropriate to literally hold this project hostage while the city and county come to terms on more general matters. The conditions as outlined by Councilman Nichols are not appropriate conditions for approval of a specific development project. They are literally not

within the control of the applicant; therefore, he is not able to meet such conditions individually. These are matters currently under discussion by county/city governmental committees. The responsibility for meeting such conditions rests solely with the city and the county, regardless of the Ravenwood proposal.

Hilda Wheeler

HW/rd

Enclosure

OFFICE OF THE
CITY MANAGER

196 E. Fifth Street
P.O. Box 3420
Chico, CA 95927
(916) 895-4803
ATSS 459-4803

L-AGR-16-T29/chrono October 4, 1984

C. W. Bachman
Bachman & Associates
3012 The Esplanade
Chico, California 95926

Re: RAVENWOOD PLANNED AREA CLUSTER

Dear Cal:

Thank you for your letter of September 21, 1984, inquiring whether or not " . . . the possibility now exists for the hook-up of the above project to the City sewer system.", in the light of the current Nitrate Action Plan formulation process.

As you know, several of the key components of the pending Plan involve development of a unified land use plan for the Chico Urban Area, approval of master sewer and storm drainage plans, and formulation of a financing plan for whatever sewer and drainage plans are adopted. Since the foregoing will require intensive study and discussion between the City and the County during the coming months, it does not appear appropriate, at this time, for the City to consider further the connection of the Ravenwood Project to the City's sewer system.

I am sure you will want to continue to monitor the progress of the discussions between the City and the County on these matters in the coming months.

Thank you for your continued interest. If you have further questions or desire additional information, please do not hesitate to contact me.

Sincerely,
/s/ John
John H. Dougherty
Deputy City Manager

JHD/mb

cc: Planning Director w/att.
CM/PO/CDC/CA Info